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No. 02- 555

IN THE

Supreme Court of the United States

MR. DOUGLAS FORRESTER, ET AL.
Petitioners,
vs.
THE NEW JERSEY DEMOCRATIC PARTY, INC.
Respondents.

On Writ of Certiorari to the Supreme Court of the State of New Jersey

MOTION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF SECRETARY OF STATE BILL JONES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, California Secretary of State Bill Jones respectfully requests leave of this Court to file the *amicus curiae* brief enclosed herewith in support of Petitioners. Due to the extra-ordinary circumstances surrounding the New Jersey Supreme Court's hearing and decision and the urgency of the petition in this matter, applicant was unable to obtain the consent of all parties to the filing of this brief. Nonetheless, the underlying decision has far-reaching implications for the orderly conduct of elections in every state, including California. As the chief elections officer in the state of California, applicant has a strong interest in this Court's review and can provide valuable assistance to the Court in consideration of the weighty issues presented by the petition.

The Secretary of State of California[1] is an office created by the California Constitution, Article V, sections 5 and 11 and is charged with the responsibility, as the chief elections officer, of administering the state's elections. California Government Code section 12172.5 and Elections Code section 10.

The Secretary of State seeks to ensure the integrity of elections and the fundamental right to vote through an orderly and efficient administration of the electoral statutory scheme devised by the California Legislature.

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this application to file an *amicus curiae* brief and the *amicus curiae* brief filed in support of Petitioner was authored entirely by counsel for the Secretary of State of the State of California and was funded solely by the State of California.

The decision of the New Jersey Supreme Court in *New Jersey Democratic Party, Inc. et al. v. Hon. David Samson, et al.* on October 2, 2002 presents a perilous affront to an orderly elections process throughout the United States and in California. It will, if allowed to stand, encourage candidate substitutions after voter choices have been made, in effect nullifying the will of the voters as expressed at a primary election. It will also encourage other ballot manipulations to gain partisan advantage. The Secretary of State believes this will have an adverse effect on voter participation in California by potentially disenfranchising voters and stimulating voter cynicism that the electoral process is neither fair nor consistent.

Based on all the foregoing, applicant respectfully requests leave of this Court to file the *amicus curiae* brief enclosed.

Respectfully submitted,

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SUMMARY OF FACTS AND CASE

Senator Robert Torricelli was nominated by the Democratic party at the New Jersey primary election held on June 4, 2002 to be their standard-bearer in the November 5, 2002 General Election.

On September 30, 2002 Torricelli announced that he was withdrawing from the race for the United States Senate because he faced accusations of ethical irregularities that caused him to trail in polls against his opponents. He did not intend, he said, to be the cause of the Democratic Party losing its one seat majority in the United States Senate.

This matter was initiated by the New Jersey Democratic Party in the Superior Court, Law Division, Middlesex County, on September 30, 2002. They sought to prohibit Torricelli's name from being included on ballots, a declaration that the New Jersey Democratic State Committee could select a candidate to fill the vacancy created by the withdrawal of Torricelli, and to enjoin the printing of all ballots for the general election. The New Jersey Democratic Party also sought direct certification of the matter to the New Jersey Supreme Court.

The New Jersey Democratic Party petitioned the New Jersey Supreme Court on October 1, 2002 to remove Torricelli's name from the ballot as the Democratic Party candidate for the United States Senate and substitute another candidate in his place. New Jersey's election law sets a deadline of 51 days prior to a general election for the change of a party's nominee. On October 1, 2002 only 35 days remained before the November 5, 2002 general election.

The New Jersey Supreme Court issued an order on October 2, 2002 directing that Torricelli be removed from the ballot as the Democratic candidate for the United States Senate

and that a candidate selected by the Democratic State Committee replace him. Revised general election ballots are to be prepared with precedence given to military and overseas ballots. Absentee and overseas ballots had already been printed and mailed containing Torricelli's name. The court further directed that the plaintiffs deposit $800,000 to a judicial trust fund to cover the cost of implementing the order. The Attorney General was directed to take all steps to avoid voter confusion including sending an explanatory letter to voters who received the revised ballot.

The New Jersey Democratic State Committee on October 2, 2002 selected Frank Lautenberg to be the Democratic candidate for the United States Senate.

A petition for certiorari was filed on October 4, 2002 in this Court by Torricelli's opponents for the New Jersey seat in the United States Senate.

SUMMARY OF ARGUMENT

It is essential to the safeguarding of the basic right to vote that voters have confidence in the fairness, consistency, and integrity of the elections process. To serve those goals, election officials must scrupulously and impartially enforce the statutory electoral schemes enacted by their Legislatures.

It is likewise critical that a state's electoral scheme be given deference by courts unless a constitutional defect is demonstrated.

While California's electoral scheme differs from New Jersey's, both are permissible exercises of the legislative charge under Article I, section 4 of the Constitution to regulate the time, place, and manner of elections.

When a court intrudes into a constitutionally valid electoral scheme it engages in *ad hoc* deformations and violence to the election process. New abbreviated mailing and printing deadlines are set, new rules are made up, new officials are entrusted with key election responsibilities, new financial burdens are placed on political parties, and the choices voters made during the primary election are ignored. In fact, the actual votes of those who vote either by absentee ballot or live overseas may be disregarded entirely or else a clumsy mechanism must be set up in order for them to re-cast votes.

This judicially generated confusion in an election process, particularly when it is near election itself, creates voter anxiety and confusion and generates increased voter cynicism about the integrity of the vote itself. The effect is to lower voter participation. The structure of a democratic government, built upon robust voter participation and confidence in the election, is undermined. This inescapable effect is absolutely unnecessary. Election laws should be strictly enforced. Voters expect it. Voters depend on it. The Constitution requires it.

This summer the Secretary of State confronted repeated attempts in state court to substitute candidates for federal and state offices. These attempts were stimulated by a little noted county judicial race in which one candidate was removed from the ballot at his request long after the statutory deadline for withdrawing from a race had passed. The candidate with the next highest votes was then ordered substituted on the ballot. If the decision of the New Jersey Supreme Court in this case, involving a United States Senate race and attended by national notoriety is allowed to stand, it will cause a wave of similar cases in California and throughout the country. Timelines set forth in election statutes will be challenged as arbitrary figures no matter what the state interest is that justifies them. Political parties will attempt to effectively nullify the results of primary elections where it is politically expedient. Election officials

will be unable to prepare for an election until the last minute thereby creating a significantly higher risk of error in the administration of the election. No primary candidacy success will be seen as certain. All races will be up for grabs because of the New Jersey example. Voters will be unsure if their candidate choices matter.

Finally, one portion of the New Jersey Supreme Court's October 2, 2002 order is particularly troubling. By requiring the prevailing New Jersey Democratic Party to pay $800,000 for the substitution of Torricelli for another candidate, the court has essentially made it impossible for minor parties who cannot afford such a sum, to take advantage of the chance to switch candidates after the statutory deadline has passed. It turns the election process into a crude pay-to-play farce. If nothing else, the need to require such a payment in order to effectuate the court's order obliterating old deadlines and election statutes, is a violation of the 14th Amendment's equal protection requirement since only major political parties can utilize it.

ARGUMENT

I. State electoral plans, unless constitutionally defective, must be respected by the courts to avoid voter confusion.

The Constitution requires state legislatures to prescribe the "time, place, and manner" of elections for Senators and Representatives (Article I, section 4).

The purpose of such regulation by the states is to ensure that elections take place with finality, certainty, and fairness on the appointed dates. "We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic processes." *Anderson v.*

Celebrezze, 460 U.S. 780 (1983); citing *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The central purpose of such substantial regulation, as the courts have said repeatedly, is to avoid voter confusion which jeopardizes the exercise of this most basic right. "(T)he State has a compelling interest in minimizing voter confusion," and "there is an important state interest, if no other, in avoiding confusion at the general election."*Lightfoot v. Eu*, 964 F.2d 865, as amended, certiorari denied, 507 U.S. 919(9th Cir. 1992) citing *Jenness v. Fortson*, 403 U.S. 431 at 442.

This state interest in avoiding voter confusion is so important that it rises higher even than the right of political parties to nominate their candidates, "(P)olitical parties' rights to nominate whomever they want, *however they want*, is not sacred." *Lightfoot, supra.* (Emphasis added)

It is vital to bear in mind in any election, that the rights, desires, and interests of the voters are the heart and soul of the entire process. The paramount vice of the decision by the New Jersey Supreme Court is to elevate the wishes and interests of a political party and a single individual, Robert Torricelli above that of the voters. While the court made brief references in its order to try to avoid voter confusion, the inescapable fact is that the order *itself creates* the circumstances for that confusion. Any change to the complex election process at such a late date when ballots have been printed and mailed out inherently creates voter confusion, and causes voters to lose confidence in the electoral process.

If an electoral system is enacted by a state legislature, as directed by the Constitution, and that system is not constitutionally suspect, then the courts must not ride roughshod into the schedules, ongoing plans and preparations, and expectations for an upcoming election. The harm becomes

more severe when the judicial intrusion is committed close to the election, while the preparations are moving forward at high speed. In this case, the New Jersey Supreme Court stepped in to change one candidate out for another with only 35 days left before the November 5, 2002 general election.

In California, for example, any statewide action like that ordered by the New Jersey Supreme Court would make the November 5, 2002 election impossible to conduct. California has 25,000 polling places and 15 million registered voters. The process for absentee voting has begun. Overseas military and civilian voting is long underway. Millions of ballots in tens of thousands of different ballot styles have been printed and shipped to the state's 58 counties. And voters have read and been guided by the candidates listed and described in the statutorily-mandated statewide voter ballot pamphlet, mailed to more than 11 million households.

Voter confusion, a compelling state interest taken into account when drawing up complex electoral systems, is certainly avoidable if courts defer to established statutory deadlines and requirements. This is especially so near a major election.

II. The New Jersey Supreme Court's Order will create a wave of similar pernicious claims in California.

Although the New Jersey Supreme Court's order has no binding precedential effect on California, or indeed any other state, it nevertheless will trigger a wave of similarly damaging and destructive claims throughout the United States and in California. These claims, like the successful case in New Jersey, will utterly deprive primary elections of any significance. If one candidate can be swapped for another on the shallow pretext in New Jersey, then primaries will be contests without point or purpose. This is profoundly harmful to

the vitally necessary voter confidence in the integrity of the entire election process.

"It is clear that the avoidance of confusion and deception of the democratic process at a general election as well as the fostering of the efficient operation of the primary system are valid and legitimate state goals." *Fridley v. Eu*, 131 Cal.App.3d 100, 106 (1982). This hardly needs comment in a time of declining voter participation in elections.

The primary election fulfills a number of essential purposes in a well designed election system. "(B)y encouraging candidates to place their name on the primary election ballot□fosters open campaigns where both candidates and issues will be brought before the electorate, and *surprise nominations* of little-supported candidates will be avoided." *Fridley, supra* at 105. (Emphasis added). Likewise, federal courts have recognized that a primary election also validates "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Lightfoot, supra* at 19. Needless to say, when candidates are switched out after a primary and near a general election, there is no showing of support, of whatever sort, and surprise becomes the unwholesome hallmark of elections. It also could result in voters being misled as the replacement candidate presents himself as the party standard-bearer when the candidate may not be supported by the party membership as a whole, but only by the much smaller party apparatus.

It is also unfortunate that the very bad example of New Jersey's experience this fall will be repeated. The publicity already surrounding this Senate race has been enormous and any action by this Court will serve to add to it.

In California the example of a *single* little noted

candidate substitution following long after the primary was sufficient to cause multiple copycat claims. An Orange County incumbent judge, facing trial on charges of child pornography, successfully sought to have his name removed from the general election ballot. Another candidate then successfully sought to be placed on the ballot instead. This was in direct contravention of California law which requires a candidate to die at least 68 days prior to the general election before a vacancy occurs that can be filled. (California Elections Code sections 8803, 8807) Two California state judges, moved undoubtedly by the same vague sense of equity that animated the New Jersey Supreme Court, issued the orders.

Nevertheless, this one case spawned others even closer to the general election, this time seeking to substitute candidates for Congress and the California Legislature. While these lawsuits were unsuccessful, they tried to stay the preparations for the statewide general election, including freezing the printing and distribution of ballots and the mailing of overseas ballots. If one of these stays had succeeded it would have crippled California's ability to successfully carry out the November 5, 2002 general election. Too many days needed for preparations would have been lost.

The New Jersey example, if it stands, will likewise cross party lines as parties and candidates try to carve more chunks out of state election systems.

It worked once spectacularly, they will say.

It can work again.

III. The New Jersey Supreme Court's Order must be overturned because it violates the Equal Protection Clause of the 14th Amendment.

Integral to the New Jersey Supreme Court's Order is the requirement that the prevailing party, the state Democratic Party, deposit $800,000 to a trust fund that will be used to cover the cost of implementing the newly created statewide tasks involved in switching one candidate for another so close to the general election.

The New Jersey Supreme Court approvingly cited its own state precedent which took account of the needs of both major and minor political parties.

California, like New Jersey, also has a number of minor political parties.

But in either state, no minor political party is likely to have the financial ability to make the same claim that the New Jersey Supreme Court accepted to substitute one candidate for United States Senator for another and pay for it.

It gravely harms the election process when, by court order and not legislative deliberation or popular wish, wealthy political parties can manipulate the process while the voters and minor political parties are left out of the process. The manipulation by court order is bad enough but when it involves the unjustified distinction between rich and poor political parties, it becomes a vice involving a violation of the 14th Amendment's promise of equal protection of the laws.

If for no other reason, the New Jersey Supreme Court's Order must be overturned.

CONCLUSION

The October 2, 2002 Order of the New Jersey Supreme Court should be overturned.

October 4, 2002

Respectfully submitted,

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